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No. 737

In the Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN CABLE SYSTEMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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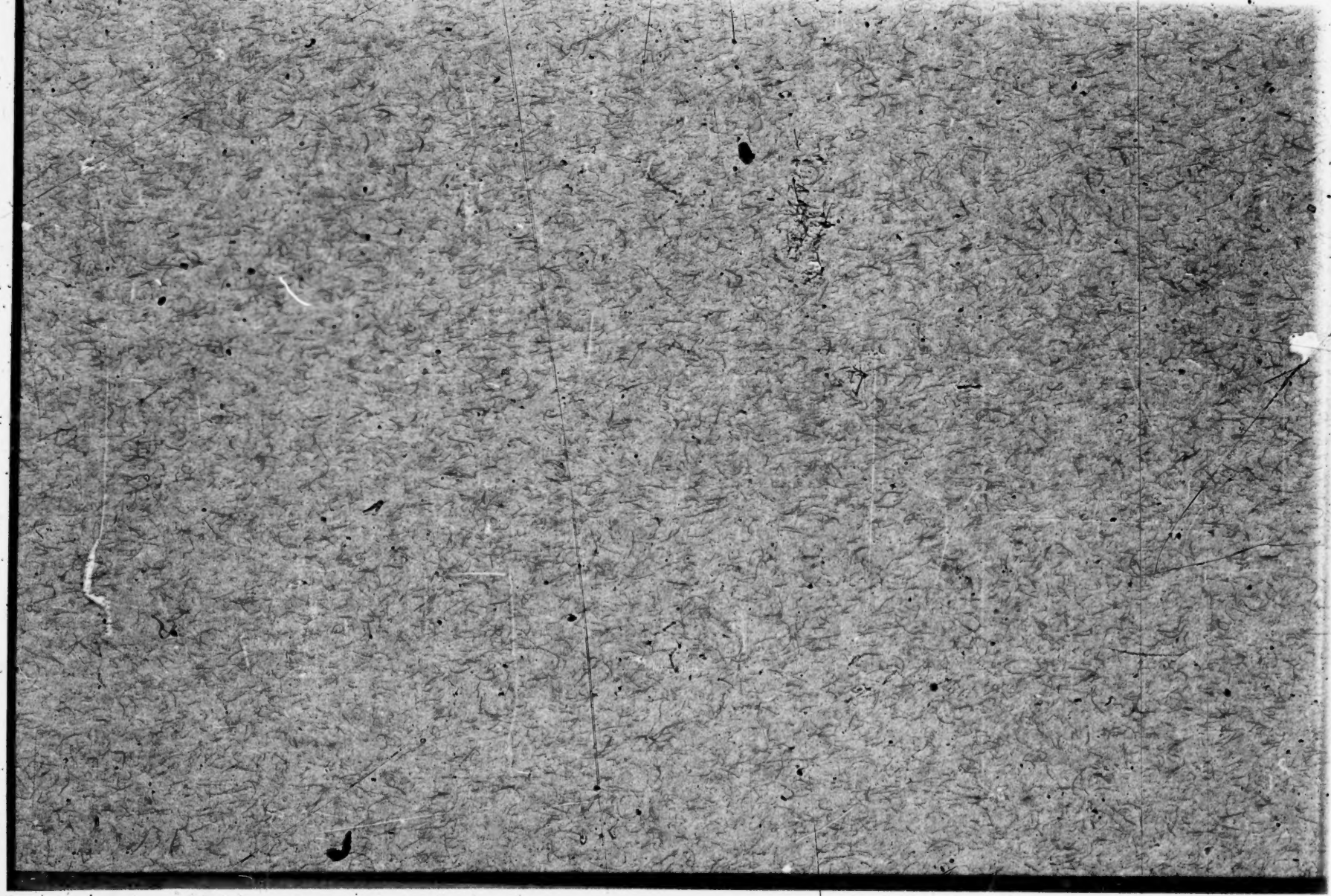

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No. —

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v.

AMERICAN CABLE SYSTEMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–5a) following the Board's supplemental decision, reported at 427 F. 2d 446; the court's initial opinion remanding the case to the Board (App. C, *infra*, pp. 7a–20a), is reported at 414 F. 2d 661. The Board's initial decision and order (App. D, *infra*, pp. 21a–48a) are reported at 161 NLRB 332; the Board's supplemental decision and order (App. E, *infra*, pp. 49a–51a) are reported at 179 NLRB No. 149.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, p. 52a) was entered on April 23, 1970. The Board's timely petition for rehearing *en banc* was denied on June 23, 1970 (App. B, *infra*, p. 6a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon finding that an employer's unfair labor practices precluded the holding of a fair representation election, the National Labor Relations Board is barred from issuing a bargaining order without considering the effect of the complete turnover of the employees in the bargaining unit and the departure of the offending management official, both of which occurred a substantial period after the unfair labor practices took place.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *

> Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT*

The factual pattern of this case is all too familiar. On July 12, 1965,[1] the Union[2] wrote the Company requesting recognition as the representative of its employees on the basis of authorization cards from three of the four employees in the bargaining unit (App. D, *infra*, p. 31a; R. 94; J.A. 92).[3] (The other employee signed a card one week later (App. D, *infra*,

---

*"R." refers to Volume I, Transcript of Record, and "J.A." to the joint appendix, in the court of appeals. A copy of each has been filed with the Clerk.

[1] All dates hereinafter are in 1965.

[2] Communications Workers of America, AFL-CIO.

[3] The Company operates a community antenna television business in the Tupelo, Mississippi, area (App. D, *infra*, p. 31a; R. 94).

[4] A fifth employee, Goldbar, also signed a card but was excluded from the unit because the Board found he was being groomed for a supervisory position (App. D, *infra*, p. 34a; R. 20, n. 3).

p. 31a; R. 133, 104)). On receipt of the Union's request, Company Manager Haley asked card-signers Aclin and Goldbar whether they "were a part of it."; when they replied in the affirmative, Haley immediately discharged them, saying, "I'll get somebody loyal to me" (App. D, *infra*, pp. 26a, 31a–32a; R. 94–95; J.A. 77, 69–70). Haley later called his attorney and explained what had happened; shortly thereafter he rescinded the discharges, informing the two employees that he "couldn't fire" them, that they should continue working, and "we will see what happens from here on" (App. D, *infra*, p. 32a; R. 95; J.A. 21–22, 78, 70).

Haley then advised the Union that he would be out of town until the end of the month and would get in touch upon his return; he left for Denver the following day, and returned on July 27 (App. D, *infra*, p. 32a; J.A. 10, 93–94). In the meantime, the Union filed a petition for a Board election (App. D, *infra*, p. 32a; J.A. 104–110).

During the ten-week period preceding the representation election, held on October 15, Aclin, Goldbar and the other employees in the unit—Cook, Dodson and Taylor—were subjected to an extensive antiunion campaign by the Company. Thus, a few days after his return from Denver, Manager Haley reminded employee Cook that Esau had sold his birthright for a bowl of soup, and added that "that was what [the employees] were doing when [they] signed the Union cards for the Union to represent [them]." A number of times later he asked Cook why the employees wanted the Union to represent them. (App. D, *infra*, p. 37a; R. 101; J.A. 53–54, 60.) Also, on various other occasions

Haley told Cook, whom he knew to be the union leader, that the Union would not do Cook "any good" and that he was "wasting his time even participating in it" (App. D, *infra*, p. 38a; R. 102; J.A. 56–57); that in the future the only way he would ever get anything out of the Company was for the Union to "force me to give it to him" (App. D, *infra*, p. 36a; R. 100; J.A. 28, 88, 24, 99); and that although the Company had intended to offer Cook the opportunity to manage a branch office, the Union's coming had "messed up" those plans (App. D, *infra*, p. 38a; R. 101–102; J.A. 54, 58–59, 66, 87).

In August, Haley informed several employees that job classifications would be required if the Union succeeded, and that, in any event, the Company would institute working rules and classifications (App. D, *infra*, p. 36a; R. 100; J.A. 26–27, 98). In conversations with employees Dodson and Cook he related that, if he had known the employees wanted a union, he would have assisted them in any way he could to form a Company union, and that he could have obtained a lawyer to draw up the necessary papers (App. D, *infra*, p. 36a; R. 100; J.A. 30, 55, 62–63, 100–101, 115). He also asked what he had done to make the employees want a union, and who among them had initiated the union activity (App. D, *infra*, p. 35a; R. 99; J.A. 40–42, 39, 12, 28, 85). To Dodson, Manager Haley declared that he had done all he could for Cook, and that "the Union would have to give" Cook whatever he received thereafter (App. D, *infra*, p. 35a; R. 99; J.A. 39–40).

Haley also interrogated employee Goldbar about the identity of the Union organizer; Goldbar disclosed

that it was Cook (App. D, *infra*, p. 35a; R. 99; J.A. 78–80). Haley later asked Goldbar "what the boys thought" about the Union, adding that the employees would have more to gain without a union (App. D, *infra*, p. 35a; R. 99, 100; J.A. 79, 32, 33–34, 13–15, 101).

Finally, about a week after employee Taylor had signed a union authorization card, Haley told him that he understood Taylor wanted more money. Haley added: "Well, I cannot give you a raise until the Union is over. They'll say I'm trying to influence you" (App. D, *infra*, p. 36a; R. 100; J.A. 46–49, 85-86).

In the representation election held on October 15, one vote was cast in favor of the Union, two against it, and two ballots were challenged. The election was subsequently set aside because of the company's unfair labor practices. (App. D, *infra*, pp. 27a–28a, 44a; R. 95–96, 108–109, 132, 137.)

B. THE INITIAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

On the foregoing facts, the Board found that the Company had discharged employees because of their union activities in violation of Section 8(a)(3) and (1) of the Act; had coercively interrogated, threatened and promised benefits to its employees in violation of Section 8(a)(1) (App. D, *infra*, pp. 22a, 34a, 38a–39a; R. 97, 103, 132); and, in violation of Section 8(a)(5), had refused the Union's request to bargain without a good faith doubt of the Union's majority status, as shown by the Company's "flagrant and

serious unfair labor practices" (App. D, *infra*, pp. 22a–27a; R. 133–137). Since the Union had valid authorization cards from a majority of employees in an appropriate unit, the Board ordered the Company to cease and desist from the unfair labor practices, and to bargain with the Union upon request (App. D, *infra*, pp. 27a–28a, 46a–47a; R. 111–113, 138–140).

Although sustaining the Board's other findings and conclusions the court of appeals remanded the bargaining order portion of the case to the Board for further findings in light of this Court's intervening decision in *National Labor Relations Board* v. *Gissel Packing Company*, 395 U.S. 575 (App. C, *infra*, p. 20a).

C. THE SUPPLEMENTAL BOARD AND COURT DECISIONS

The Board, after reviewing the entire record and the responses of the parties, concluded that under the standards enunciated in *Gissel* a bargaining order was warranted because the Company's Section 8(a) (1) and (3) violations not only precluded a fair election, "but were of such pervasive and aggravated character * * * that an order directing the Respondent to bargain with the Union is necessary to repair their unlawful effects," and because the unlawful conduct "has undermined the Union's majority, and caused an election to be a less reliable guide to the employees' free choice than the signed authorization cards by which they designated the Union to represent them" (App. E, *infra*, pp. 50a–51a.) In reaching these conclusions, the Board rejected the Company's contention

that a complete turnover in employees and the departure of the only management official involved in the unfair labor practices (see App. A, *infra*, p. 3a) obviated the necessity for a bargaining order (App. E, *infra*, p. 51a, n. 3).

Again the court of appeals declined to enforce the bargaining order and remanded the case to the Board. The court deemed inapplicable the general rule that "changes occurring after an unfair labor practice are not usually proper reasons for denying enforcement of a Board order" because this Court in *Gissel* had "placed bargaining orders * * * in a special category: an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere" (App. A, *infra*, pp. 3a–4a). In the court's view "*Gissel* clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election." A "jejune regurgitation of the Company's 1965 waywardness * * * [is] insufficient under the teachings of *Gissel* to justify a 1970 bargaining order." (App. A, *infra*, pp. 4a–5a.) Accordingly, the court remanded the case to the Board for further findings as to "the contemporary necessity for such an order" (App. A., *infra*, p. 5a).

REASONS FOR GRANTING THE WRIT

This case presents an important issue in the administration of the National Labor Relations Act: whether the Board is precluded from issuing a bargaining order without considering changes in the

employee complement and the departure of the management official who committed the statutory violations—changes that occurred a substantial time after the employer committed the unfair labor practices. The holding of the Fifth Circuit in the present case that the Board must consider those changes rests upon a misinterpretation of the Court's recent decision in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, and is contrary to the teaching of such earlier decisions of this Court as *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702 and *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16. Insofar as the decision below rests on the change in the employee complement, it conflicts with the Sixth Circuit's decision in *G.P.D., Inc.* v. *National Labor Relations Board* (C.A. 6, No. 19963, decided August 11, 1970), 74 L.R.R.M. 3057.

There is frequently a substantial employee turnover in cases where the employer's unfair labor practices have interfered with the election process.[5] Thus the decision below, if allowed to stand, is likely to encourage employers to resist union demands for recognition and to result in substantial litigation before the Board and, in view of the disagreement among the circuits, in those courts of appeals that have not yet decided the question. Corrective action by this Court is therefore warranted.

[5] The Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Clark's Gamble Corp.*, No. 265, 1970 Term, involves a similar issue. In that case, the court of appeals also directed the Board to assess employee turnover, but held that if there had been a "substantial" turnover the Board *must* order a rerun election, not bargaining.

1. a. The court of appeals recognized "the general rule of long standing that compliance with the Board order, loss of union majority, or other changes occurring after an unfair labor practice are not usually proper reasons for denying enforcement of a Board order" (App. A, *infra*, pp. 3a–4a), but thought this was changed by *Gissel*. To the contrary, *Gissel* recognized the continuing vitality of this rule when, as in this case, the employer's unfair labor practices "have in fact undermined a union's majority and caused an election to be set aside";

> We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB v. Katz*, 369 U.S. 736, 748, n. 16 (1962); *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board. * * *

395 U.S. at 610.

The reasons for the Board's continued adherence to this policy[*]—and for this Court's recognition of

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[*] In a recent decision, rendered in light of the court of appeals' opinion in this case, the Board reasserted its position that it will not consider employee turnover when deciding whether to issue a bargaining order. *Gibson Products Co.*, 185 N.L.R.B. No. 74, 75 L.R.R.M. 1055 (August 27, 1970). Accord

the Board's authority to do so—are apparent. To take into account the effects of employee turnover, to assess changes that may be occurring even as the Board deliberates, to determine whether old employees left as a consequence of the employer's unlawful thwarting of unionization, to discover whether departing employees or those remaining passed the word to new hires—in short, for the Board to engage in the inquiry demanded by the court of appeals as a condition to enforcement of a bargaining order—could, as this Court has repeatedly recognized, only result in "rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,' *Franks Bros., supra,* at 704." *National Labor Relations Board* v. *Gissel Packing Co., supra,* 395 U.S. at 610. For whatever the outcome of this calculus, the facts remain that a majority of employees expressed support for the union through authorization cards and yet the union lost an election because of the employer's pervasive unfair labor practices.

As the case moves through the Board's administrative processes the employer all the while reaps the benefits of his illegalities: unionization has been stalled. During this period, the composition of the work force may of course change, as it did here, and it is also possible, as this Court has pointed out, that interest in the union may wane. *Gissel, supra,* 395 U.S.

Vaca Valley Bus Lines, 179 N.L.R.B. No. 107, 72 L.R.R.M. 1425 (November 19, 1969); *U-Tote-M of Oklahoma*, 170 N.L.R.B. No. 141, 72 L.R.R.M. 1506, 1507, n. 4 (December 2, 1967).

[7] Or an election was precluded.

at 611; n. 31. But it is for these very reasons that the Board has refused to consider employee turnover, and, in fulfilling its duty to "re-establish the conditions as they existed before the employer's unlawful campaign," *id.* at 612, has instead evaluated the propriety of a bargaining order in terms of the effect of the employer's unfair labor practices on the employee complement as it existed at the time of the employer's unlawful acts.

The rule the Fifth Circuit has here announced, however, ignores both this duty on the Board and this Court's reminder that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." *Id.* at 612.

b. For the same reasons the Board properly refused to consider the departure of the supervisory official directly responsible for committing the unfair labor practices. The Fifth Circuit's holding that the Board must consider this fact before it issues a bargaining order in authorization card cases involves the same defects as its ruling respecting employee turnover.

This is not to say that affirmative and voluntary action by the employer, such as discharging, suspending, or reprimanding the offending supervisor, either before or shortly after an election, is irrelevant. The Board takes this into account because in such cases the employer's action may sufficiently eradicate the effects of the unfair labor practices to make it possible to conduct a fair election or a fair rerun shortly after the violations have occurred, see *Central*

Soya of Canton, 180 N.L.R.B. No. 86, 73 L.R.R.M. 1069 (January 6, 1970), and because the Board seeks to encourage voluntary remedial action. But here the Company never contended that it fired the offending supervisor because of his actions or informed the employees of any change of attitude toward the Union, or that the supervisor's departure occurred either before or shortly after the election.

2. Insofar as it requires the Board to consider employee turnover, the decision below conflicts with the Sixth Circuit's decision in *G.P.D., Inc.* v. *National Labor Relations Board* (No. 19963, decided August 11, 1970), 74 L.R.R.M. 3057, 3058, which relied on *Gissel* in rejecting the employer's argument "that a bargaining order is not justified * * * because in the four and one-half years of litigation which has followed the initial organization of its employees, there has been a nearly complete turnover of its employees."[8] It also is inconsistent with *National Labor Relations Board* v. *L. B. Foster Co.*, 418 F. 2d 1, 4 (C.A. 9), certiorari denied, 397 U.S. 990, which upheld a Board bargaining

[8] The court (Judges Edwards and Celebrezze, with Judge McCree dissenting) distinguished its earlier decision in *Clark's Gamble Corp.* v. *National Labor Relations Board*, 422 F.2d 845, pending on the Board's petition for a writ of certiorari (n. 5, *supra*), on the ground that "[r]egardless of the merits of that decision, it can hardly be deemed applicable to a record such as this where G.P.D.'s own willful and gross violations of the N.L.R.A. directly caused both the turnover of employees and the delay" 74 LRRM at 3058. Judge McCree, who dissented, was on the panel that decided *Clark's Gamble*.

order entered after there had been a significant change in employees since the unfair labor practices.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1970.

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[9] Although in *Foster* the court did not remand the Board's original decision for further proceedings, the court indicated that its view that employee turnover was irrelevant applied whether the turnover occurred before or after the Board's decision or whether there was an intervening remand. 418 F. 2d at 4.

Appendix A

In the United States Court of Appeals
for the Fifth Circuit

No. 25358

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN CABLE SYSTEMS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board (Mississippi Case)

(March 30, 1970)

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge

GOLDBERG, *Circuit Judge:* In the first act of what we trust will be only a two-act play and not a drama of Shakespearian proportions, we remanded this case to the National Labor Relations Board for additional findings in light of *NLRB* v. *Gissel Packing Co.*, 1969, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547. In remanding we said:

> Under the *Gissel* holding a bargaining order may issue where: (a) the union had valid authorization cards from a majority of the employees in an appropriate bargaining unit; (b) the employer's unfair labor practices, although not "outrageous" and "pervasive" enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a

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fair rerun) by the use of traditional remedies, though present, is slight", and (d) employee sentiment can best be protected in the particular case by a bargaining order. In the case *sub judice* the Board did not make findings on all of these points because "its current practice at the time required it to phrase its findings in terms of an employer's good faith doubts * * *" Since it is inappropriate for this Court to make findings on these questions, we remand the case to the Board for appropriate findings. *NLRB* v. *American Cable Systems, Inc.*, 5 Cir. 1969, 414 F. 2d 661, 668.

On remand the Board made the following supplemental findings, which were issued on December 3, 1969:

> Without relying on our earlier finding that the Respondent acted in bad faith in refusing to bargain with the Union as the majority representative of its employees in an appropriate unit, we now find that the Respondent's violations of Section 8(a) (1) and (3) of the Act, as summarized above, not only precluded a fair election, but were of such pervasive and aggravated character as to warrant the finding, which we now make, that an order directing the Respondent to bargain with the Union is necessary to repair their unlawful effects. The aforementioned conduct has undermined the Union's majority, and caused an election to be a less reliable guide to the employees' free choice than the signed authorization cards by which they designated the Union to represent them.

On the basis of these supplemental findings the Board again petitions this court to enforce its order requiring the Company to recognize and bargain with the Union. Having determined that these findings of the Board are still insufficient under the teachings of

Gissel to justify a bargaining order, we once again remand to the Board for additional findings.

In making its determination on December 3, 1969, that the Company's 1965 violations of § 8(a) (1) and (3) precluded a fair election and necessitated a bargaining order, the Board specifically refused to consider evidence offered by the Company that a complete turnover in employees and the departure of the only management official involved in the unfair labor practices made a free election possible at that time. The Board's refusal to consider these changes occurring in the intervening years was apparently predicated on the opinion of the Ninth Circuit in *NLRB v. L. B. Foster Co.*, 9 Cir. 1969, 418 F. 2d 1. In *Foster* the complaint was made that changes occurring between the Board's original order and the enforcement proceeding made enforcement of the bargaining order inequitable. The court refused to consider those changes and enforced the order based on the Board's original findings. The *Foster* case, however, is distinguishable because although it was decided after *Gissel* it did not involve a remand in light of that case to the Board for additional findings. In the instant case a different situation obtains. The Board's original findings were inadequate under the teachings of *Gissel* and the case had to be remanded to the Board for further findings. We think that on remand the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified.

In so holding we are not unaware of the general rule of long standing that compliance with the Board order, loss of union majority, or other changes occur-

ring after an unfair labor practice are not usually proper reasons for denying enforcement of a Board order. *NLRB* v. *Katz*, 1962; 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230; *NLRB* v. *Mexia Textile Mills, Inc.*, 1950, 339 U.S. 563, 70 S.Ct. 826, 94 L.Ed. 1067; *Franks Bros. Co.* v. *NLRB*, 1944, 321 U.S. 702, 64 S.Ct. 817, 88 L.Ed. 1020; *NLRB* v. *P. Lorillard Co.*, 1942 314 U.S. 512, 62 S.Ct. 397, 86 L.Ed. 380. We find the reasoning of these cases inapplicable to the instant case, however, because of the Supreme Court's decision in *Gissel*. In *Gissel* the Court made it plain that a bargaining order issued on the basis of a card majority is not the preferred method of establishing a union's representative status and that such an order should be issued only when in the Board's judgment "the possibility of * * * ensuring a fair election * * * by the use of traditional remedies, though present, is slight * * *" 395 U.S. at 614. The Court in Gissel thus placed bargaining orders on a card majority in a special category: an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice. See, *e.g.*, *NLRB* v. *Mexia Textile Mills, Inc.*, *supra*. On the contrary, the Supreme Court indicated that an open free election rather than a bargaining order is the preferred remedy if such an election is possible. We think it clear from the foregoing that the Court in *Gissel* clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.

In the instant case the Board made no such finding before it issued the December 3, 1969, bargaining order which we are here asked to enforce. Instead, on remand the Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the Company's 1965 waywardness. We deem such findings insufficient under the teachings of *Gissel* to justify a 1970 bargaining order. *Gissel* does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity—a present view, albeit with an historical prospective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election. On the other hand, if the employer's 1965 violations of § 8 (a)(1) and (3) have a 1970 existence, *Gissel* commands the issuance of a bargaining order. Since the Board did not address itself to this question, we must again remand for further findings as to the present necessity for a bargaining order.

In addition, we think a further word of caution is in order. In our previous disposition of this case we requested findings from the Board. The response which we received was a litany, reciting conclusions by rote without factual explication. We believe that the questions involved in this area of labor law are far too important for such formalistic and perfunctory treatment. Since *Gissel* teaches us that authorization cards are not as trustworthy as ballots all concerned must be particularly careful lest the principles of majoritarianism in union representation be unnecessarily frustrated by the cavalier use of bargaining orders. We therefore remand to the Board with the hope that we have here given sufficient guidance that the Board may resolve this controversy now approaching its fifth anniversary.

REMANDED.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 25358

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN CABLE SYSTEMS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board (Mississippi Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(June 23, 1970)

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 25358

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN CABLE SYSTEMS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board (Mississippi Case)

(July 18, 1969)

Before GOLDBERG and AINSWORTH, Circuit Judges and SPEARS, District Judge

GOLDBERG, *Circuit Judge:* We once again encounter the question of what an employer may do and must not do when confronted with a union recognition demand based on authorization cards rather than votes. In determining whether the company has transgressed the bounds of the permissible, we must re-examine our prior rulings in this area in the light of the Supreme Court's recent decision in *NLRB v. Gissel Packing Co.*, 1969, 37 U.S.L.W. 4536.

In its petition to this Court the National Labor Relations Board seeks enforcement of its order directing the respondent, American Cable Systems, Inc., to recognize and bargain collectively with the Communications Workers of America. The Board found that the company had attempted to discourage union

membership by coercive interrogations, promises of benefits, and discriminatory discharges, and that it had thereby violated §§ 8(a) (1) and (3) of the National Labor Relations Act. Reasoning that these unfair labor practices showed that the company's refusal to bargain was not motivated by a "good faith doubt" as to the union's majority status, the Board held that the company had violated its § 8(a)(5) duty to bargain collectively with the representative of its employees. The Board then concluded that these unfair labor practices could best be remedied by a bargaining order.

American Cable admits its guilt with respect to the §§ 8(a) (1) and (3) violations. The company, however, vigorously denies any violation of the § 8(a)(5) duty to bargain and argues that the bargaining order was therefore unwarranted. It asserts that cards essential to the union's majority were fatally tainted because there were misrepresentations in their solicitation and because the solicitor was a supervisor. Postulating that the union did not have a majority of valid authorization cards, the company contends that it did not have a duty to bargain and therefore that it did not violate § 8(a)(5). It further argues that, even assuming a valid card majority, the independent unfair labor practices were not flagrant enough either to warrant the Board's inference that the refusal to bargain was not in "good faith" or to justify the issuance of a bargaining order.

Since the Board's findings with respect to the §§ 8 (a)(1) and (3) violations are uncontested, we enforce this part of the Board's order without further ado. We also agree with the Board's determination that the union had a majority of valid authorization cards at the time of its demand for recognition. As to the

§ 8(a)(5) issue and the propriety of the Board's bargaining order, however, we must, in the light of the new standards announced by the Supreme Court in *NLRB* v. *Gissel Packing Co., supra,* deny enforcement and remand for further findings.

I.

American Cable, which is in the CATV (community antenna television) business, operates in the area of Tupelo, Mississippi. At all material times the company had seven employees plus a general manager.

On July 12, 1965, the union wrote to the company, requesting recognition as the exclusive bargaining agent for the company's seven employees. The union stated that it was prepared to prove its majority status by a show of authorization cards and that it wanted to meet and bargain with the company. At this time the union had in its possession signed authorization cards from four of the company's seven employees.

Upon receipt of the union's letter, the general manager summoned two of the card signers and asked whether they "were part of it." When the two replied that they were, the general manager promptly gave them two weeks notice. Shortly thereafter he interrogated a third employee who saved his job by lying about his union activities.

The general manager then called an attorney, presented him with the foregoing facts, and requested advice. The attorney advised that the discharges were unlawful and should be rescinded immediately. On the basis of this advice and within minutes of the discharges, the discharged employees were reinstated. The general manager told the two employees in the

presence of the other interrogated employee that he "had made a mistake, that everything was as it was, and we could continue to work." Thus the company asserts that when shown how it had violated the Act, it "did all it could to cure its original sin."

The difficulty with American Cable's assertion is that the company subsequently backed away from its righteous position and took another bite of the forbidden fruit. On July 16 the union filed a representation petition and, after the customary hearing, an election was scheduled for October 15. Between the time of the union's petition and election day, the company engaged in additional unfair labor practices. The general manager in conversations with at least five employees asked questions about the union's activities and inquired of the questionees what they thought of the union. He then suggested that the employees should form a "company union" promising future benefits to one employee while suggesting to others that, if the union were selected, the company would withhold benefits that they would otherwise receive.

When the election was held on October 15, the vote was 2–1 against the union. Immediately thereafter, the union filed objections to the election and unfair labor practice charges against the company. Proceedings culminating in this Court were then initiated before the Board.

II.

American Cable's first argument is that it did not violate § 8(a)(5) because the union did not have a majority of valid authorization cards at the time of its demand for recognition and bargaining. The company does not argue that the language on the face

of the cards is ambiguous or misleading.[1] Rather, the company contends that the invalidity of the cards arises because (a) they were solicited by a "supervisor" and (b) the solicitor misrepresented the purpose of the cards to the signers. Since the union had only four authorization cards from a bargaining unit of seven employees, the vitiation of one card will destroy the union's majority.

Solicitations by alleged supervisor.—It is well established that cards solicited by supervisory personnel may not be considered in determining a union's majority status. *NLRB* v. *Hecks, Inc.*, 4 Cir. 1967, 386 F. 2d 317, 322. The rationale for this rule is that a supervisor, through his power over the economic well-being of his charges, is in a position to exert undue and intrinsically coercive influence over their decisions as to whether or not to sign a card. For this rule to apply, however, the record must show either that the solicitor was in fact a supervisor within the contemplation of § 2(11) of the Act,[2] or that the

[1] The company does not challenge the Board's finding that "t[he] cards used by the Union in this case clearly state on their face that the signer designates the Union as his 'collective bargaining representative.' In bold letters at the bottom of the face of the card are the words 'REPRESENTATION AUTHORIZATION.' No other purpose for the cards is shown on either the face or the back of the cards." 161 N.L.R.B. No. 28 (1966).

[2] Section 2(11) of the National Labor Relations Act defines "supervisor" in the following manner:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

employees solicited had good reason for believing him to be a supervisor and that the circumstances of the solicitation were inherently coercive. *Cf. Plastic Workers Local 18* v. *NLRB*, 7 Cir. 1966, 369 F. 2d 226, 230.

The alleged supervisor was a trusted employee who was appointed by the general manager to oversee several projects and to train new employees. He was, however, given no authority to hire, fire, promote, or discharge employees. Nor did he "(1) have authority (2) to use independent judgment (3) in performing such supervisory functions (4) in the interest of management." *NLRB* v. *Security Guard Service, Inc.*, 5 Cir. 1967, 384 F. 2d 143, 147. Under these circumstances we find that the record supports the Board's finding that he was not a supervisor within the meaning of the Act. See *NLRB* v. *American Mfg. Co. of Texas*, 5 Cir. 1968, —— F. 2d —— [No. 25443 Dec. 30, 1968]. He was no more than a senior employee, leadman, or straw boss. As we said in *Security Guard*, *supra*, 384 F. 2d at 151:

> If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Moreover, the record does not reflect that the leadman improperly used his position in soliciting cards or that the circumstances of the solicitation warrant any inference of threats or coercion.

Misrepresentations as to the purpose of the cards.— American Cable asserts that at least one authorization card should be invalidated because it was solicited under the misrepresentation that its *only* purpose

was to secure a representation election and because the signer did not really understand the full consequences of his act. Since the record does not support the company's assertion that the signer was told that the sole, only and singular purpose of the cards was to petition for an election, we turn to the second and more significant prong of the company's misrepresentation argument. American Cable argues that there is not substantial evidence in this record to show that the General Counsel has met his burden of proving that each signer subjectively intended to authorize the union to represent him and that he was aware that he might not be able to resolve any remaining doubts in the protected isolation of the polling booth. In making this argument the company relies primarily upon a line of Fifth Circuit cases holding that the General Counsel, when trying to prove the validity of a card majority, cannot rely on the mere fact that each employee signed an unambiguous authorization card or upon the fact that the signer was not told that the *only* purpose of the card was the securing of an election. This court has repeatedly held that the General Counsel must go further and show that the signer subjectively intended to designate the union to represent him. In *Engineers and Fabricators, Inc.* v. *NLRB*, 5 Cir. 1967, this Court wrote:

> When cards are challenged because of alleged misrepresentations in their procurement, the general counsel must show that the subjective intent to authorize union representation was not vitiated by such representations. Here the Board did not apply this legal standard. Instead it contends that "* * * documents timely executed which unequivocally authorize a labor organization to act as the collective-bargaining agent of the signers must be treated as valid bargaining authorizations in the absence

> of a showing of coercion in their procurement or representations that "despite the purpose clearly and expressly stated on the cards themselves the cards would be used only for a different more limited purpose." Aero Corp., 149 NLRB No. 114, 57 LRRM at 1490."
>
> This applies too lax a standard, and therefore the burden was not met. The point is that the Board applied the facts to the wrong legal standard because there was no probing into the subjective intent of the challenged signers.

See also *National Labor Relations Board* v. *J. M. Machinery Corp.*, 5 Cir. 1959, —— F. 2d —— [No. 23576 April 9, 1969]; *NLRB* v. *Texas Electric Cooperatives, Inc.*, 5 Cir. 1968, 398 F. 2d 722; *NLRB* v. *Southland Paint Co., Inc.*, 5 Cir. 1968, 394 F. 2d 717; *NLRB* v. *Lake Butler Apparel Co.*, 5 Cir. 1968, 392 F. 2d 76.

"In holding that the subjective intent of the signer must be probed, this Court rejected the rule laid down by the Board in *Cumberland Shoe Corp.*, 1964, 144 N.L.R.B. 1268, enforced, 6 Cir. 1965, 351 F. 2d 917, that there is but one misrepresentation as to the purpose of a card which will vitiate the card: "a statement by the solicitor that the *only* purpose of the card is to obtain an election." *NLRB* v. *Southland Paint Co.*, supra, 394 F. 2d at 726. We reasoned that the card solicitor by using a few carefully chosen words, could avoid the Board's mechanical *Cumberland Shoe* rule and still leave the employee with the impression that he was merely petitioning for an election rather than irretrievably designating the union to represent him. Thus the reassuring and somewhat misleading words of the solicitor could easily overshadow and negate the effect of any caveat on the face of the card. In order to prevent any such undermining of employee freedom of choice, we refused to validate cards unless there had been a probe into

the signer's intrapsychic processes. In this stand we had the support of the Fourth and Second Circuits. See *Crawford Mfg. Co.* v. *NLRB*, 4 Cir. 1967, 386 F. 2d 367, *cert. denied*, 390 U.S. 1028; *NLRB* v. *S. E. Nichols Co.*, 2 Cir. 1967, 380 F. 2d 438. The Board's *Cumberland Shoe* rule, however, was not without support among the Circuits. See, e.g., *UAW* v. *NLRB*, D.C. Cir. 1967, 392 F. 2d 801; *NLRB* v. *Southbridge Sheet Metal Works*, 1 Cir. 1967, 380 F. 2d 851.

With the Circuits in substantial conflict, the time was ripe for Supreme Court action. In *NLRB* v. *Gissel Packing Co.*, 1969, 37 U.S.L.W. 4536, 44–45, the Supreme Court resolved the conflict in favor of the Board's *Cumberland Shoe* rule and against this Court's subjective intent doctrine:

> In resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% of the employees when an employer rejects a bargaining demand and insists that the union seek an election. We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signin represents something else. In addition to ap-

proving the use of cards, of course, Congress has expressly authorized reliance on employee signatures alone in other areas of labor relations, even where criminal sanctions hang in the balance, and we should not act hastily in disregarding congressional judgments that employees can be counted on to take responsibility for their acts.

We agree, however, with the Board's own warnings in *Levi Strauss*, 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

In view of the *Gissel* decision, the company's argument concerning the card signers' subjective intent is no longer tenable. We hold that the cards relied on by the union were not so tainted by misrepresentations as to be invalid.[4]

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[4] We note that the Supreme Court in *Gissel* expressly stated that "nothing we say here indicates our approval of the *Cumberland Shoe* rule when applied to ambiguous, dual purpose cards." 37 U.S.L.W. at 4545. Moreover, the Court stated "[w]e need make no decision as to the conflicting approaches used with regard to dual-purpose cards. . . ." *Id.* at 4544. Thus our earlier decisions regarding ambiguities in the language on the faces of cards, e.g., *I.T.T. Semi-Conductors, Inc.* v. *NLRB*, 5 Cir. 1968, 395 F. 2d 257; *NLRB* v. *Peterson Bros.*, 5 Cir. 1965, 342 F. 2d 221, are still sound.

III.

We now reach the ultimate questions: (a) whether the Board correctly determined that American Cable violated § 8(a) (5) of the Act by refusing to bargain with the union on the basis of authorization cards; and (b) whether, assuming the violation, the bargaining order issued by the Board was a proper remedy. In answering these questions our guidance comes from the lucid teachings of the Supreme Court in *Gissel* rather than from prior decisions of this Court and the Board.

The full impact of the *Gissel* decision can best be comprehended in the light of the Board's prior practice in refusal to bargain cases, which practice is illustrated by the Board's decision in the case at bar. 161 N.L.R.B. No. 28 (1966). Here the Board first determined that the union had valid authorization cards from a majority of the employees in an appropriate bargaining unit, and then it measured the company's refusal to bargain in the context of the company's conduct after its receipt of the union's demand for recognition. The inquiry was to determine whether the company's refusal to bargain was motivated by a "good faith doubt" as to the union's majority, since under long standing Board policy a refusal to bargain which is not motivated by such "good faith doubt" violates § 8(a)(5). The quest was for the subjective—the company's motivation. The yardstick, however, was objective—what management said and did.

The Board reviewed the list of American Cable's preelection unfair labor practices and found that these malefactions evidenced the company's "rejection of the collective bargaining principle and its desire to destroy the union's majority status." The refusal to bargain was, therefore, made in bad faith and in violation

of §8(a)(5). The decision to issue a bargaining order followed automatically and without further analysis.

This line of reasoning, which has been upheld by the courts on myriad occasions,[4] is no longer viable. In *Gissel* the Supreme Court, while upholding the validity of bargaining orders where the employer has committed serious independent unfair labor practices, announced: "an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election, 37 U.S.L.W. at 4540. In *Gissel* the Supreme Court in effect approved the following approach for determining whether an employer's refusal to bargain is violative of §8(a)(5) and whether a bargaining order should issue:

> When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under §9(c)(1)(B). If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations. A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or

[4] See, e.g., *NLRB* v. *Movie Star, Inc.*, 5 Cir. 1966, 361 F. 2d 343, 351; *Joy Silk Mills, Inc.* v. *NLRB*, D.C. Cir. 1950, 185 F. 2d 732.

coercion or if the employer's unfair labor practices are unrelated generally to the representation campaign. 37 U.S.L.W. at 4540.

The precise standard adopted by the Court was articulated as follows:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehaviour. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order, then such an order should issue (see n. 32, *supra*).
>
> We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no *per se* rule that the commission of any unfair practice

> will automatically result in a § 8(a)(5) violation and the issuance of an order to bargain. [case cited].[5]

Under the *Gissel* holding a bargaining order may issue where: (a) the union had valid authorization cards from a majority of the employees in an appropriate bargaining unit; (b) the employer's unfair labor practices, although not "outrageous" and "pervasive" enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight"; and (d) employee sentiment can best be protected in the particular case by a bargaining order. In the case *sub judice* the Board did not make findings on all of these points because "its current practice at the time required it to phrase its findings in terms of an employer's good faith doubts * * * ." Since it is inappropriate for this Court to make findings on these questions, we remand the case to the Board for appropriate findings.

The part of the Board's order concerning American Cable's violations of §§ 8(a)(1) and (3) is ENFORCED. As to the Board's bargaining order and the underlying finding of a §8(a)(5) violation, ENFORCEMENT IS DENIED AND THE CASE IS REMANDED FOR FURTHER FINDINGS.

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[5] The Supreme Court was careful to emphasize that it was not deciding "whether a bargaining order is ever appropriate in cases where there is not interference with the election process." *Id.* at 4547. Since in the case *sub judice*, as in the cases before the Supreme Court, the employer's refusal to bargain was accompanied by independent unfair labor practices, we follow in the footsteps of the Supreme Court and express no opinion on that issue.

APPENDIX D

Decision of National Labor Relations Board

American Cable Systems, Inc. and Communications Workers of America, AFL–CIO. *Cases 26–CA–2229 and 26–RC–2447. October 24, 1966*

DECISION AND ORDER

On May 18, 1966, Trial Examiner John G. Gregg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint, and recommended that such allegations be dismissed. He found further that the Respondent had interfered with an election held on October 15, 1965, and recommended that it be set aside and that a new election be held. Thereafter, the Respondent, the Charging Party, and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman McCulloch and Members Brown and Zagoria].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in these cases, and finds merit in the exceptions of the Charging Party. Accordingly, the Board adopts the Trial Examiner's findings,[1] conclusions, and recommendations only to the extent they are consistent herewith.

We find, in agreement with the Trial Examiner, that the Respondent, immediately after receiving the Union's letter demanding recognition, interrogated employees about their union activities and discharged two employees, Aclin and Goldbar, because they had signed union authorization cards, in violation of Section 8(a) (1) and (3) of the Act. We also find, in agreement with the Trial Examiner, that the Respondent, subsequent to the Union's filing of a representation petition in Case 26-RC-2447, by its interrogations, threats, and promises of benefit, interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. We also agree with the Trial Examiner that this post-petition conduct interfered with the election and that the election should be set aside. However, in disagreement with the Trial Examiner, we find that the Respondent's refusal to

[1] The Respondent operates a community antenna television system and during 1965 purchased and received from out of State goods, materials, and services valued in excess of $100,000. The parties stipulated, and we find, that for the purposes of these proceedings, the Respondent's operations satisfy the Board's communications system standards for assertion of jurisdiction. *General Telephone and Electronics Communications, Inc.*, 160 NLRB 1192.

bargain with the Union was in bad faith and therefore in violation of Section 8(a)(5) of the Act.

We initially find, in agreement with the Trial Examiner, that on July 13, the date that the Respondent received the Union's demand for recognition, the Union had in its possession signed cards from three of the four employees in an appropriate bargaining unit,[2] and it therefore was majority representative of these employees. The Respondent excepted to this finding of the Trial Examiner and contends that the union authorization cards signed by two of these employees, Aclin and Dodson, were tainted because both of these cards were solicited by Cook, the signer of the third card, whom the employees considered to be a supervisor.[3]

We agree with the Trial Examiner that the cards of Aclin and Dodson were not tainted for this reason, since an examination of the circumstances surrounding the solicitation of cards by Cook shows that neither Aclin nor Dodson was coerced in signing an authorization card because he felt Cook was a supervisor.

We also agree with the Trial Examiner that Aclin and Dodson's cards were not tainted because Cook misinformed them as to the purpose of the cards. The

[2] In Case 26–RC–2447, the Acting Regional Director found that the appropriate unit is: All production and maintenance employees of American Cable Systems, Inc., at its operations at West Point, Okolona, and Tupelo, Mississippi; excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act. On October 6, 1965, the Board denied the Respondent's request for review of this decision and at the hearing in this proceeding the parties agreed that they were bound by the Acting Regional Director's unit findings.

[3] In the representation case, the Acting Regional Director found that Cook was not a supervisor and that he should be included in the unit.

Board has held on a number of occasions that authorization cards designating the union as bargaining agent do not lose their force as valid designations because the signers are told that the cards will be used to obtain an election absent a representation that the cards are to be used *only* to secure an election.[1]

The cards which were used by the Union in this case clearly state on their face that the signer designates the Union as his "collective bargaining representative." In bold-letters at the bottom of the face of the card are the words "REPRESENTATION AUTHORIZATION." No other purpose for the cards is shown on either the face or the back of the cards. Cook testified that he told both Aclin and Dodson that the cards were to be used both for having the Union represent them and for having an election, and that he gave both of them union literature which he told them to read prior to their signing of the cards. The Trial Examiner neither credited nor discredited this testimony by Cook. Dodson did not testify that he was told that the "only" purpose of the card was to have an election. On direct examination, Aclin also did not testify that he was told that the "only" purpose was for an election. He testified only that Cook did not mention to him that the purpose of the card was to have the Union represent him and that Cook "gave me the card and some more information about the Union, and told me to take it home and read it over. If I wanted to sign it I could sign it, but I didn't have to if I didn't want to. He said the card was for the purpose of getting a Union election, and told me

[1] *The Shelby Manufacturing Company*, 155 NLRB 464.

what the election would be for, for the Union . . . ." The Trial Examiner's statement that Aclin testified that: "he was told the only purpose of signing the card was to get an election," was apparently based solely on Aclin's testimony on cross-examination. This consisted of affirmative responses by Aclin to several questions propounded by the Respondent's counsel as to whether he was "told that at the time [he] signed the card that it was to be used for the purpose of getting an election" and whether he was "told that was the only purpose for which the card was to be used." Also, in a sworn prehearing statement, Aclin stated that: "When I signed the union card on July 1, 1965, I understood it was for the purpose of having Communication Workers of American Union to represent me in collective bargaining." In view of these circumstances, we do not deem that portion of Aclin's testimony, consisting of "yes" answers to leading questions, as sufficient by itself to nullify the clear statement of the purpose and effect of the card as shown on its face. We therefore agree with the Trial Examiner that the record does not establish that either Dodson or Aclin at the time they signed the cards had been informed that the only purpose for which these cards would be used would be to obtain an election or that they acted in reliance upon any misrepresentation to that effect. We accordingly find that the Union was representative of a majority of employees in the appropriate unit on July 13, 1965.

See *N.L.R.B.* v. *Cumberland Shoe Corporation*, 351 F.2d 917, 919 (C.A. 6), enfg. 144 NLRB 1268, as amended by an unreported Order: *Bryant Chucking Grinder Company*, 160 NLRB 1526.

the date the Respondent received its initial demand for recognition."

The Trial Examiner found that the Respondent's refusal to bargain was not in bad faith, and therefore did not violate Section 8(a)(5). We disagree. We have already found that the Respondent engaged in unfair labor practices, violative of Section 8(a)(1) and (3) of the Act. These unfair labor practices began immediately upon the Respondent's receipt of the Union's demand for recognition on July 13, 1965, when Haley, the Respondent's manager, asked three employees if they "were a part of it" and discharged the two employees who admitted that they had signed union cards. Haley was absent from the area for a period of about 2 weeks, starting July 14, during which period the Union filed a petition for an election. Between the time of Haley's return and the October 15, 1965, election, Haley, in conversations with at least five employees, including all four of the employees who were in the unit found appropriate as of the date of the Union's demand, among other things, questioned some as to who started the union activity and what employees thought of the Union; suggested to some that the employees should

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[6] See *The Shelby Manufacturing Company*, *supra*, and the cases cited therein at footnote 4 of the Board's Decision and Order.

In view of our findings herein, we deem it unnecessary to determine whether, as found by the Trial Examiner, Taylor's card, which was signed on July 20, was valid.

For the reasons stated in *Dan Howard Mfg. Co. and Dan Howard Sportswear, Inc.*, 158 NLRB 805, footnote 5, Member Brown would rely upon the employees' signatures to cards designating the Union as their bargaining agent, to establish the majority status of the Union at the time it requested recognition, as the best evidence of employees' intent.

form a "company union"; promised future benefits to another and suggested to some that, if the Union were selected, the Respondent would withhold benefits they would have otherwise received. Thus, the record show that, beginning immediately with the receipt of the Union's demand for recognition, the Respondent, through its manager, Haley, committed flagrant and serious unfair labor practices affecting its employees.[7] The foregoing conduct convinces us that the Respondent's conduct evidenced its rejection of the collective-bargaining principle and its desire to destroy the Union's majority status. We, accordingly, find that the Respondent's refusal to bargain with the Union was not in good faith and therefore violated Section 8(a)(5).[8]

Accordingly, and as we have already found that the Union represented a majority of the Respondent's employees in an appropriate unit, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

Although we agree with the Trial Examiner's finding that during the critical preelection period the Respondent engaged in a course of conduct which interfered with the employees' freedom of choice in the selection of a bargaining representative, and his recommendation based thereon that the election of October 15, 1965, be set aside, in view of our holding that the Respondent violated Section 8(a)(5) and our order requiring the Respondent to bargain with the

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[7] Cf. *Hammond & Irving, Incorporated*, 154 NLRB 1071.

[8] *The Shelby Manufacturing Company*, *supra*, and the cases cited therein in footnote 6 of the Board's Decision and Order: *Borden Cabinet Corporation*, 159 NLRB 1373. Cf. *Bee Dathler, Inc.*, 157 NLRB 69; *John P. Serpa, Inc.*, 155 NLRB 99.

Union. We do not adopt the Trial Examiner's further recommendation that a new election be directed. Instead, as no current question concerning representation exists, we shall dismiss the petition in Case 26–RC–2447 and vacate all proceedings held in connection therewith.[10]

[The Board adopted the Trial Examiner's Recommended Order with the following modifications:

[1. Add the following as paragraph 1(c):

[" (c) Refusing to bargain collectively with Communications Workers of America, AFL–CIO, as the exclusive representative of its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. The appropriate unit is:

[" All production and maintenance employees at American Cable Systems, Inc., operations at West Point, Okolona, and Tupelo, Mississippi; excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act."

[2. Add the following as paragraph 2(a) and reletter the present paragraph 2(a) and all subsequent paragraphs:

[" (a) Upon request, bargain collectively with Communications Workers of America, AFL–CIO, as the exclusive representative of employees at the Respondent's operations in West Point, Okolona, and Tupelo, Mississippi, in the above-described appropriate unit, and embody any understanding reached in a signed contract."

Beidel Foam Products, Co., Inc., 146 NLRB 1277; *Irving Air Chute Co.*, 149 NLRB 627, enfd. 350 F.2d 176 (C.A. 2).

[10] *S.N.C. Manufacturing Company, Inc.*, 147 NLRB 809, enfd. 352 F.2d 361 (C.A.D.C.), cert. denied 382 U.S. 902.

[3. Delete the third paragraph of the notice and add the following:

[WE WILL bargain collectively, upon request, with Communications Workers of America, AFL–CIO, as the exclusive bargaining representative of all our employees in the appropriate unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed contract. The appropriate unit is:

[All production and maintenance employees at American Cable Systems, Inc., operations at West Point, Okolona, and Tupelo, Mississippi; excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

[All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.]

[The Board dismissed the petition in Case 26–RC–2447 and vacated all proceedings held in connection therewith.]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed October 21, 1965, by the Communications Workers of America, AFL–CIO, amended December 3, 1965; and a Supplemental Decision on Challenged Ballots and Objections dated November 19, 1965, issued by the Regional Director for Region 26 directing a hearing to resolve issues raised by the Union's objections 1, 2, and 3; the General Counsel, through the Regional Director for the Region 26 issued an order consolidating cases, complaint and notice of hearing on December 6, 1965, consolidating Cases 26–PC–2447 and 26–

CA–2229 for hearing; alleging that the Respondent, American Cable Systems has engaged in conduct which violated Section 8(a)(1), (3), and (5) of the Act.

Thereafter a hearing was held before Trial Examiner John G. Gregg at Tupelo, Mississippi, on February 8, 1966. All parties were represented by counsel. The Respondent filed a brief.

Based upon the entire record in this case, my observation of the witnesses and their demeanor, and careful consideration of the Respondent's brief, I make the following:

Findings and Conclusions

I. The pertinent commerce facts

During the year 1964 the Respondent, in the course and conduct of its business operations derived gross revenue in excess of $100,000; purchased and received at its Mississippi locations television signals originating outside the State of Mississippi in the amount of approximately $19,800; purchased and received at its Mississippi locations goods and materials in an amount valued between $35,000 and $40,000 directly from points outside the State of Mississippi. During the year 1965 the Respondent, in the course and conduct of its business operations, purchased and received at its Mississippi location goods, materials, and services valued in excess of $50,000 directly from points located outside the State of Mississippi; purchased and received at its Mississippi location goods, materials, and services valued in excess of $50,000 from other enterprises or persons located in the State of Mississippi. The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The background

The Respondent is engaged in the erection of master antennas which pick up television signals, amplify them, and conduct them through overhead coaxial cables. The service is sold to subscribers in the Okolona, West Point, and Tupelo areas. Okolona is 17 miles south of Tupelo. West Point is 50 miles south of Tupelo on the same route. At the times material herein the Respondent employed approximately eight employees of whom five were service personnel. These service personnel frequently go from one location to another as required by maintenance and operations. They were based at Tupelo with the exception of Taylor who was based at West Point.

On July 12, 1965, the Union wrote to the Respondent requesting recognition as the exclusive bargaining agent for the Respondent's production and maintenance employees in the Tupelo, Mississippi, area stating that it was prepared to prove that a majority of these employees had designated the Union as their representative for collective bargaining, requesting further that the Respondent meet and bargain with the Union and requesting a reply by July 16, 1965.

At that time Respondent's employees Kenneth Aclin, Fred Cook, Rubin Goldbar, and Jimmy Dodson had signed union cards, and later on July 20, 1965, Donnie Taylor signed a card. On receipt of the letter on July 13 the Respondent's manager, Frank G. Haley, sum-

moned Goldbar and Aclin, asked whether they "were a part of it" and when told they were, gave them 2 weeks' notice. He later queried employee Dodson who stated that he had not signed a card. Haley then sought legal counsel, following which he promptly advised Aclin and Goldbar that he rescinded the 2 weeks' notice, that he had made a mistake, that everything "was as it was and that he would continue to work them." Haley then wrote and advised the Union that he had received their letter but that he would be out of town until the end of the month at which time he would contact them. Haley left the following day for a convention in Denver which he had planned for in March. He returned on July 27.

In the meantime, the Union on July 16 filed a petition to be certified as representative of all the maintenance and production employees at Tupelo and West Point for the purposes of collective bargaining. A hearing was held on August 2, 1965, soon after Haley's return, and on September 15 the Regional Director issued a decision and direction of election. In this Decision the unit found appropriate was one including the production and maintenance employees at three of the Respondent's locations: Tupelo, West Point, and Okolona. The election was held on October 15, and resulted in a 2–1 vote against the Union. Three of the six ballots cast were challenged. The Union filed objections to the election, then on October 21 the Union filed unfair labor charges. On November 19 the Regional Director issued a Decision on the challenged ballots and objections in which he sustained the challenges, dismissed objection 4 because it related to incidents occurring prior to the filing of the petition and found that the three remaining objections raised the same issues contained in the unfair labor charges. On December 6, 1965, by order

consolidating cases, complaint and notice of hearing the unfair labor practice case was consolidated with the objections to the election for hearing before a trial examiner.

B. The discriminatory discharges

The General Counsel alleges that on or about July 13 the Respondent terminated its employees Aclin, Dodson, and Goldbar because they joined or assisted the Union or engaged in other union or concerted activities for the purposes of collective bargaining or other mutual aid or protection. Haley, the Respondent's manager, testified that after receiving the demand letter from the Union on July 13, he was in a state of shock. He could not conceive that two of his men whom he regarded as supervisors, on the management side of the team, had signed cards. He was not sure what production and maintenance employees meant. He asked Aclin and Goldbar if they were part of it, and both of them said they were, that they had signed cards. He gave them both 2 weeks' notice.

The Respondent concedes the improper notice to Aclin, but alleges that Goldbar is a supervisor and that Dodson was not terminated. I find no evidence of record on which to base a finding that Dodson was terminated hence recommend dismissal of that portion of the complaint alleging his dismissal. I find that Aclin was discriminatorily terminated because of his union activities which were protected by the Act. I do not conclude as the Respondent avers, that this was not a termination, or that in view of the prompt rescission by the Respondent it was cured. In subsequent testimony by Haley he freely refers to his action as a discharge.[1] Nor

[1] Haley testified that he told his attorney "that I had fired two of my men * * *"

do I hold with the Respondent that with respect to Goldbar there can be no discriminatory discharge in view of his alleged status as a supervisor. Although Goldbar was later excluded from the unit because he was being groomed for a supervisory position, it is uncontradicted that at the time of the action under consideration, he was in fact working in the field with the other servicemen for the purpose of training in various phases of the work and had not as yet achieved the status of supervisor. In view of this I find that at the time of the termination he was an employee whose union or other concerted activities were protected by the Act. *The Yale & Towne Manufacturing Company*, 135 NLRB 926.

I find therefore that the Respondent did discriminatorily terminate Aclin and Goldbar because of their protected union activity in violation of Section 8(a)(3) and (1) of the Act. I find that Dodson was not improperly discharged and recommend dismissal of that portion of the complaint.

C. Interference, restraint, and coercion

The complaint, as amended, alleges that the Respondent, by its supervisor and agent, Frank Haley, on or about July 13, July 16, late July, August 2, early August, and during late August or early September, at its Tupelo, Mississippi, location interrogated its employees concerning union sympathies, activities, and desires of its employees; that the Respondent by its supervisor and agent, Frank Haley, on or about mid-August 1965, in a truck on a Tupelo street, advised its employee that he had foregone his chance for advancement by participation in the union or concerted activities; that the Respondent, by Haley, on or about September 15, 1965, threatened employees with more stringent and different working conditions if the Union were selected to represent them; and impressed

on employees the futility of their selecting the Union as their bargaining representative by warning them that they would not receive any benefits by selecting the Union.

The Respondent concedes that there was questioning of employees on July 13. The Respondent contends that the questioning at that time was proper by way of the Respondent's verifying the Union's claimed majority. There is no question but that Haley queried Aclin, Goldbar, and Dodson concerning their connection with the union demand of July 13. I am convinced that this was not done by way of determining whether the Union did in fact have a majority, or for a legitimate purpose nor was it accomplished in such fashion as to avoid a coercive quality. *Johnnie's Poultry Co.*, 146 NERB 770. From Haley's prompt reaction of dealing out 2 weeks' notice and from additional pertinent testimony of record it is reasonable to find and I do find that the questioning was for the purpose of identifying those who were to be punished because of their union activity.

Turning to Haley's actions subsequent to the filing of the petition on July 16, James Dodson testified to a conversation he had with Haley sometime after Haley's return from Denver when Haley said to Dodson that he had done all he could for Mr. Cook, and anything that Cook got from them the Union would have to give to him. Dodson also testified that Haley asked him who among the shopmen had started the union activity, this occurring from 2 weeks to a month following Haley's return from Denver. I credit this testimony by Dodson.

Goldbar testified that several weeks after Haley returned from Denver and during a conversation in the shop Haley asked who started the Union or who was behind it and Goldbar said, Freddie Cook; that in September, Haley queried him as to what the boys thought about the Union. I credit this testimony by Goldbar.

Haley testified that after his return from Denver on July 27 he had various conversations with his employees about the Union, that on possibly two occasions within the 2 weeks following his return he expressed a desire to know what he had done, "or what had caused this, why they wanted it." Haley also testified that he told several employees, about the first day of August, that the only reason the Union wanted in was so "the fellows would pay dues and pay the salaries of the union officials."

Haley testified further that around August 1, he stated to some of the employees, "Why don't you five, or you men, form your own organization. I said company union. I meant for them, the employees to form their Union."

Q. When your say Company you mean a unit confined to your company?

A. Yes.

According to Haley, in a conversation with Taylor after the filing of the petition and prior to the election, he told Taylor that he understood that Taylor wanted to make more money, but that since it was not the normal time for Haley to give raises it might be misunderstood. Implicit in this statement is a promise of future benefit.

Haley testified that in a heated conversation with Cook, he told Cook "I had gotten him everything he had gotten, and from now on anything he got from the Company would be because the Union got it for him, that I had done as much as I could." Haley sometime in August told some of the employees that regardless of whether the Union got in or not working rules and job classifications would have to be made up. He stated that if the Union got in they would require job classifications. Haley also stated to an employee sometime in September that he thought the employees would have more to gain in the future without a union.

While the Respondent attempted to explain away and dilute the effect of much of Haley's statements I found more of the explanations considerably contrived and of dubious persuasion. For instance in explaining Haley's remarks relative to the formation of a company union, the Respondent made much of the point that Haley's words were couched in terms of what could have been done rather than as a proposal of what could and should be done. While recognizing the difference I do not find that it dilutes the effect of the statement on the Respondent's employees. Similarly, in explaining the statement that the employees would have more to gain in the future without a union, the Respondent attempted to show that what was meant was that the Company would lose flexibility in the use and development of personnel should the Union be selected. I find this statement however to transmit the thought that if the Union were selected the employees would not receive future benefits otherwise obtainable if the Union were not selected. In explaining the meaning of his conversations with employees at various times in August as to "why they wanted the Union, what he had done to them that made them feel the working conditions were so bad that they needed someone to straighten it out other than themselves," Haley characterized these conversations as "thinking out loud." Their effect is nonetheless coercive.

Cook testified that a few days after Haley returned from Denver, Haley stated to the effect that Esau sold his birthright for a bowl of soup and that was what the men did when they signed the union cards. Haley asked Cook why the men wanted the Union to represent them. Cook testified further that on an occasion after Haley's return from Denver, Haley mentioned that the union situation had upset

his plans for the men and the Company. Cook stated that Haley had told him that he wanted Cook to help train new men that came into the Company because of Cook's knowledge of the system, that Haley discussed the possibility of Cook's managing a system at some other location. Cook stated that Haley said "due to the fact that since we had started the Union in the Company, that it had messed up plans for him and the Company." Cook indicated on cross-examination that this was not in his early affidavit given to General Counsel because he had not remembered it. While Cook's testimony appeared at times to be confused and contradictory, in view of my observation of Cook's demeanor while so testifying I am inclined to credit this portion of his testimony. On balance I find in the statements of Haley an unmistakable threat that if the Union were selected the Respondent would change its manner of dealing with the employees to their detriment by way of more stringent and difficult working conditions; that the selection of the Union would be futile as it would result in their failure to achieve benefits. When statements such as were made herein are made by one like Haley, clearly identified as company management and "who has the power to change prophecies into realities" whether couched in terms of probability or certainty they tend to interfere with and restrain employees in the exercise of their protected activities. *N.L.R.B. v. W. C. Nabors Co.*, 196 F. 2d 272 (C.A. 5). I find in Haley's questioning and in his statements to the employees a clear coercive warning and threat—"that the easy going camaraderie between management and employees would be a thing of the past" if the Union were selected, hence designed to discourage union activity. *Shell Oil Company*, 95 NLRB 102, 108. I find therefore that through

such interrogation, coercive statements, and threats the Respondent did interfere with, restrain, and coerce its employees in the exercise of protected union activity in violation of Section 8(a)(1) of the Act.

D. The alleged refusal to bargain

The complaint alleges that since on or about July 12, 1965, and continuing to date the Union has been the representative for collective bargaining of the employees in an appropriate unit and that commencing on or about July 13, 1965, the Union has requested and is requesting the Respondent to bargain collectively with respect thereto. The complaint further alleges that commencing on or about July 13, 1965, and at all times thereafter the Respondent did refuse and continues to refuse to recognize, meet or bargain collectively with the Union as the exclusive collective bargaining representative of all the production and maintenance employees at the Respondent's West Point, Okolona, and Tupelo, Mississippi, operations excluding office clerical employees, guards, and supervisors as defined in the Act. The complaint further alleges that the Respondent refused to recognize or bargain with the Union in order to undermine the Union and destroy its majority and that by such actions the Respondent did engage in and is engaging in unfair labor practices in violation of Section 8(a)(5) of the Act. The General Counsel identifies the issues as whether or not the Union represented a majority of the employees in the appropriate unit either on July 13 or on July 20; whether or not the Respondent had a good-faith doubt of the Union's majority status on those dates either in fact or in law and whether or not after the Union filed the petition the Respondent engaged in conduct which would set aside the election. The General Counsel contends that the Respondent has not

established misrepresentation in the solicitation of the union cards as alleged by the Respondent. On the other hand Respondent contends that it did not unlawfully refuse to bargain, that it entertained a good-faith doubt as to the Union's majority status; that the General Counsel has failed to prove an absence of a good-faith doubt and that in any event the cards were tainted in that they were solicited through misrepresentation and by one considered to be a supervisor. The Respondent also contends that the unit sought by the Union in its demand was inappropriate and that the demand was not a continuing demand but was abandoned at the time the petition was filed.

It is evident from the record that on July 13 and 20 the Union did have a majority of the four production and maintenance employees in the unit. On July 13 cards had been executed by Aclin, Dodson, and Cook. On July 20 cards had been executed by Aclin, Dodson, Cook, and Taylor. While the Respondent argues that enough of these cards were tainted so as to vitiate the majority status, I do not so find. I do not find on the basis of credited testimony of record that those who signed the cards were induced to do so by a misrepresentation that the sole or exclusive purpose of the signing of the cards was to get an election. Although Aclin testified that he was told the only purpose of signing the card was to get an election, he also stated that he was given union material and told what the Union would be for. It is clear to me from his testimony that Aclin was not misinformed or unknowledgeable as to the purpose of signing the union card. The card indicates clearly that the signer designates the Union as his collective-bargaining representative. I find therefore no misrepresentation nor any inducement to sign the card on the basis that it was for the sole purpose of securing a union

election, and therefore not tainted within the ambit of *Cumberland Shoe Corporation*, 144 NLRB 1268. Similarly in the testimony of Taylor and Dodson I do not find a clear misrepresentation inducing the signing of the cards for the sole purpose of securing a union election. I find therefore that the cards were not tainted. The Respondent contends additionally that since the cards signed by Dodson and Aclin were solicited by Cook whom the employees regarded as a supervisor, this would render them tainted. The Respondent relies heavily on *Heck's Inc.*, 156 NLRB 73. However in *Heck's* the rejected cards were solicited not only by supervisors or those considered to be supervisors but under circumstances manifesting evidence of threats of job security. I find no comparable situation herein and conclude that these employees were not coerced because of the solicitation by Cook of the cards.

Accordingly, I find no reason for their rejection, and find that the Union at the time of demand on July 13 and on July 20 possessed the required majority as evidenced by valid cards. We come then to the matter of the appropriate unit. The appropriate unit has been determined as all production and maintenance employees of the Respondent at its West Point, Okolona, and Tupelo, Mississippi, operations excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act. The Respondent contends that when the Union made its letter demand on July 13, the demand encompassed an inappropriate unit because it referred to Tupelo only. The issue posed by the Respondent's contention is whether the unit in which bargaining was initially sought is so clearly inappropriate as to relieve the Respondent of any obligation to bargain collectively, or, whether there is a substantial variance between the unit originally sought and

the unit found appropriate. I find that the variance is not substantial. The union letter demand referred to the Respondent's production and maintenance employees *in the Tupelo area* (emphasis supplied). The Respondent employed approximately eight employes five of whom were involved in production and maintenance, one of these was held to be a supervisor. The supervisor was based at Tupelo. Of the four remaining service employees three of them were based at Tupelo, Mississippi, and one of them at West Point. As we have noted *supra*, these men shifted around from location to location as the requirements of maintenance and operations dictated. The only possible confusion which the Respondent could have had with respect to the variance in the original unit was that it might have some doubt as to whether Taylor who was based at West Point was included. But there was indication that Taylor similarly worked at the two other locations when required. Accordingly, I do not find the variance between the unit sought and the unit later found appropriate sufficiently substantial to require a finding that the unit sought was inappropriate. *Brewery and Beverage Drivers and Workers, Local 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (Washington Coca-Cola Bottling Works)* v. *N.L.R.B.*, 257 F.2d 194, 196.

The Respondent alleges finally that the General Counsel failed to establish that the Respondent had no good-faith doubt when it allegedly declined to recognize the Union. After careful consideration, I am persuaded that the Respondent is correct in this contention. Dodson testified significantly that when Haley queried him as to whether he was involved in the union demand, Dodson answered that he was not. I credit Haley's straightforward account of surprise receipt of the demand and

that he would not have expected Cook and Goldbar whom he considered to be on the management team to have been involved in the union activity. While I am not persuaded, as the Respondent contends, that Haley was confused over the question of the appropriate unit, I am convinced and find that Haley did have a bona fide doubt as to whether the Union had achieved a majority. Where the General Counsel seeks to establish a violation of Section 8(a)(5) he has the burden of proving not only that the majority of employees in the unit designated the union as the bargaining representative but also that the employer in *bad faith* [emphasis supplied] declined to recognize and bargain with the union. *John P. Serpa, Inc.*, 155 NLRB 99. This is normally based on evidence indicating that the Respondent respected the collective-bargaining principle and sought merely to gain time within which to undermine the union and to dissipate its majority. *Joy Silk Mills, Inc.*, 85 NLRB 1263. Unlike *Joy Silk* the Respondent in the case at hand did not actually refuse to bargain. It quite properly set a reasonable and convenient time for responding. Its conduct after the filing of the petition by the Union, while including activity violative of Section 8(a)(1) as found herein, is not of such substance as would overcome the clear and convincing proof of the Respondent's good-faith doubt established by credited substantial testimony on the record. *Ben Duthler, Inc.* 157 NLRB 69. The Respondent's pattern of conduct following the filing of the petition is compatible with a good-faith doubt as to the Union's majority status. Since the mere finding of a violation of Section 8(a)(1) does not automatically raise the presumption that an employer acted in bad faith by refusing to bargain with the union, it certainly follows that here, where there has been no actual re-

fusal to bargain, it may not raise such a presumption. *Hammond & Irving, Incorporated*, 154 NLRB 1071.

I find therefore that the Respondent did not refuse to bargain with the Union in bad faith, that it entertained a good-faith doubt. Accordingly, I recommend dismissal of that portion of the complaint alleging that Respondent violated Section 8(a)(5) of the Act.

E. The objections to the election

The matters raised by the Union's objections to the election herein dealing with the Respondent's conduct following the filing of the petition on July 16 have been referred to me for disposition here. The incidents relied upon by the Petitioner to support the objections were the same as those which were the subject of the unfair labor practice complaint. Having found that the Respondent, through its General Manager Haley, interrogated and threatened the employees of the Respondent in violation of Section 8(a)(1) of the Act, I accordingly find that the Union's objections have been established to the extent indicated in so much of the foregoing findings as deals with Respondent's conduct between the date of the filing of the petition and the election herein. *Industrial Steel Products Company, Inc.*, 143 NLRB 336; *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782. I find that during the period between the filing of the petition and the election the Respondent through its conduct exercised coercive influence on its employees sufficient to interfere with and prevent a free, fair election and did deprive the Respondent employees of their right under the Act to choose or not to choose a bargaining representative free from interference by the Respondent.

It is accordingly recommended that the Union's objections 1, 2, and 3 be sustained to the extent indicated above, and that the said election be set aside and declared a nullity. Since I have

concluded that the Respondent did not violate Section 8(a)(5) of the Act, I find it inappropriate to recommend that the Respondent be required to bargain with the Union. I do not find this case appropriate for application of the *Bernel Foam* theory. *Bernel Foam Products Co., Inc.*, 146 NLRB 1277. Accordingly, I will recommend that a second election by secret ballot be conducted at such time as deemed appropriate by the Board.

Conclusions of Law

1. American Cable Systems, Inc., the Respondent herein, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By its conduct of interrogation, threats, and promises of benefit set forth in section III which have been found to constitute unfair labor practices the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act and has thereby engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging its employees Aclin and Goldbar because of their union activity protected by the Act the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not refused to bargain in bad faith, and has not violated Section 8(a)(5) of the Act.

The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, it is

recommended that it cease and desist therefrom and that it take certain affirmative action necessary to effectuate the policies of the Act.

In view of the Respondent's immediate recission of the unlawful discharge of Aclin and Goldbar without loss of pay or privileges no order of reinstatement or backpay is deemed required.

As discussed hereinabove, in view of the findings that certain objections to the election herein have been sustained, it is recommended that the election be set aside and declared a nullity and that a second election by secret ballot be conducted at a time deemed appropriate by the Board.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that the Respondent, American Cable Systems, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Communications Workers of America, AFL–CIO, or in any labor organization, by discharging any of its employees, or in any like manner discriminating in regard to hire or tenure of employment, or any term or condition of employment, in violation of Section 8(a)(3) and (1) of the Act.

(b) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection through unlawful interrogation, threats, and promises of benefit.

2. Take the following affirmative action, which will effectuate the policies of the Act.

(a) Post in conspicuous places at its Tupelo, West Point, and Okolona locations, including all places where notices to employees are customarily posted, copies of the attached notice

marked "Appendix." [1] Copies of said notice, to be furnished by the Regional Director for Region 26, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.[2]

IT IS FURTHER RECOMMENDED that the election held in Case No. 26–RC–2447 be set aside and that the Regional Director be directed to hold a second election at an appropriate time.

IT IS FURTHER RECOMMENDED that the complaint herein be dismissed insofar as it alleges that the Respondent engaged in any conduct violative of Section 8(a)(5) of the Act, and insofar as it alleges the discriminatory discharge of Dodson.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Rela-

[1] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[2] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

tions Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in the Communications Workers of America, AFL–CIO, or in any other labor organization, by discharging any of our employees or in any like manner discriminating in regard to hire or tenure of employment, or any term or condition of employment.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, by interrogating or threatening our employees, or by promise of benefit.

All our employees are free to become, remain, or to refrain from becoming or remaining, members of the Communications Workers of America, AFL–CIO, or of any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as amended.

AMERICAN CABLE SYSTEMS, INC.
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 764 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, Telephone 534–3161.

APPENDIX E

United States of America Before the National Labor Relations Board

Cases 26-CA-2229, 26-RC-2447

AMERICAN CABLE SYSTEMS, INC.

AND

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On October 24, 1966, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and ordering the Respondent to cease and desist therefrom and to take certain affirmative action including, *inter alia*, an order that the Respondent bargain with the Union upon request.

Thereafter, the United States Court of Appeals for the Fifth Circuit issued a decision,[2] enforcing the Board's order in part, but denying enforcement in part and remanding the instant proceeding to the Board for reconsideration of the propriety of the bargaining order and the 8(a)(5) finding in view of the Supreme Court's opinion in *N.L.R.B.* v. *Gissel*

[1] 161 NLRB 332.

[2] *N.L.R.B.* v. *American Cable Systems, Inc.*, 414 F. 2d 661 (C.A. 5).

Packing Company, 395 U.S. 575. The Board accordingly notified the parties on August 18, 1969, that they might file statements of position. Statements of position have been filed by the Respondent, the Charging Party, and the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Without relying on our earlier finding that the Respondent acted in bad faith in refusing to bargain with the Union as the majority representative of its employees in an appropriate unit, we now find that the Respondent's violations of Section 8(a)(1) and (3) of the Act, as summarized above, not only precluded a fair election, but were of such pervasive and aggravated character as to warrant the finding, which we now make, that an order directing the Respondent to bargain with the Union is necessary to repair their unlawful effects. The aforementioned conduct has undermined the Union's majority, and caused an election to be a less reliable guide to the employees' free choice than the signed authorization cards by which they designated the Union to represent them. We find, accordingly, that by refusing the Union's request and engaging in the aforesaid unfair labor practices, the

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[1] The Respondent contends that regardless of the effects which its unfair labor practices may have had upon the possibility of a rerun election at the time this case was originally considered by the Board, the intervening years have brought about a complete employee turnover and thus a free election is now possible and should constitute the Board's remedy in this case. We reject such an approach. Cf. *G.P.D., Inc.*, 179 NLRB No. 31; *Horace Simmons d/b/a Vaca Valley Bus Lines*, 179 NLRB No. 107, and cases cited therein. See also, *N.L.R.B.* v. *L. B. Foster Company*, —— F. 2d —— (C.A. 9) October 31, 1969.

Respondent violated Section 8(a)(5) of the Act and that an order requiring the Respondent to recognize and bargain with the Union is appropriate to remedy its violation of that section, as well as to remedy the other unfair labor practices found.

SUPPLEMENTAL ORDER

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby affirms its Order issued in this proceeding on October 24, 1966.

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman,

GERALD A. BROWN,
Member,

SAM ZAGORIA,
Member,

[SEAL] *National Labor Relations Board.*

APPENDIX F

United States Court of Appeals for the Fifth Circuit

No. 25,358.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN CABLE SYSTEMS, INC., RESPONDENT

SUPPLEMENTAL JUDGMENT

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated October 24, 1966, against American Cable Systems, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on September 24, 1968, and has considered the briefs and transcript of record filed in this cause. On July 18, 1969, the Court, being fully advised in the premises, handed down its opinion granting in part and denying in part enforcement of the Board's said order; and remanding that part of the Board's order with respect to the 8(a)(5) bargaining issue to the Board for further proceedings consistent with the Court's opinion. Judgment in accordance with that opinion was entered on August 12, 1969. Thereafter, pursuant to remand, the Board on January 9, 1970, filed with this Court its motion for enforcement of its order of October 24, 1966, as reaffirmed by its supplemental decision and order issued on December 3, 1969, against the above-

named Respondent, its officers, agents, successors and assigns. On March 30, 1970, the Court handed down its opinion again remanding the Board's order with respect to the 8(a)(5) bargaining issue to the Board for further consideration. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that that part of the Board's said order, as reaffirmed, with respect to the 8(a)(5) bargaining issue be, and it hereby is remanded to the Board for further proceedings consistent with the Court's opinion.

Entered: April 23, 1970.
A true copy
Test:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.
By ROSALIE AUMENT,
Deputy.

NEW ORLEANS, LOUISIANA, *July 1, 1970.*

U.S. GOVERNMENT PRINTING OFFICE: 1970

Supreme Court, U.S.
FILED
OCT 21 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 737

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMERICAN CABLE SYSTEMS, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ROBERT E. WACHS,
Attorney for Respondent.

Of Counsel:

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.[1]

Petitioner's lengthy recitation of the case[2] is irrelevant to the narrow legal issue it seeks to present.[3] The Company conceded that it violated Sections 8(a)(1) and (3) of the Act, and the Board found that such violations justified the imposition of a bargaining order.

There are additional facts, however, which bear on the question of certiorari: four employees only were eligible to vote in the election (App. D, 40a); only three voted (App. D, 32a); on May 18, 1966, the Trial Examiner recommended that a new election be held (App. D, 21a); before the Board rendered its decision, all four employees and the one Company official who violated the Act, left the Company's employ;[4] on October 24, 1966, the Board directed the Company to bargain with the Union;[5] and from that time forward, the

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1. In accordance with this Court's Rules 24 and 40, there will be no counterstatement of the question; the Company will point out, however, that this is an inappropriate case in which to raise such question.

2. We do not agree with Petitioner's characterization of the facts. Nor does the Court of Appeals. But in view of the narrow legal issue presented, it is unnecessary to review or resolve the conflicts.

3. It is fair to surmise, therefore, that Petitioner unnecessarily belabored the facts in order to have this Court resolve a factual issue which has not yet been decided by the Court of Appeals. The Court of Appeals never reviewed the finding that the violations were sufficiently pervasive to justify the bargaining order; it refused to enforce the Board's supplemental order because of the Board's failure to consider, in this case, the effect of the complete turnover of employees and management official.

4. Company's August 26, 1969 Statement of Position, filed in connection with the remand proceeding.

5. All current employees were hired after the Board's decision. See footnote 4, *supra*.

Company sought to have a new election,[6] but the Board insisted steadfastly that a bargaining order must issue, and has sought such an order from the Court of Appeals on three separate occasions.

REASONS FOR DENYING THE WRIT.

I. Petitioner is concerned that if turnover of employees and offending company officials must be considered by the Board, it will encourage employer delay and additional litigation. This case is not the appropriate vehicle for the resolution of that question. It would be so only if the turnover question was raised *after* the Board had applied the *Gissel* standards,[8] for only if the turnover was raised thereafter could Petitioner argue that although true employee sentiment might disclose that a fair election could be held, administrative convenience requires the sacrifice of employee free choice and the imposition of a bargaining order.

In the present case, the turnover question was raised *before* the Board applied the *Gissel* standards. Thus, when such standards were considered, there would have been no administrative inconvenience to the Board, and no encouragement to the Company to delay or seek further litigation, had the effect of turnover been considered at that time.

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6. When enforcement first was sought in the Court of Appeals, the Company conceded there was sufficient evidence to find it had violated the Act, and that therefore a new election was appropriate.

7. There is a factual question which has not yet been resolved. See footnote 2, *supra*. It is unnecessary to resolve the Petition on that ground, however, particularly since the Company does not seek any further litigation in this case.

8. In *NLRB v. Gissel Packing Co.*, 395 U. S. 575 (1969), this Court required the Board, before issuing a bargaining order, to determine whether "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." (at p. 614-15).

The Court of Appeals made such a distinction, by distinguishing the present case from the usual situation:

> "In the instant case a different situation obtains. The Board's original findings were inadequate under the teachings of *Gissel* and the case had to be remanded to the Board for further findings. We think that on remand the Board shold have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified." (App. A, 3a)

Thus, in the normal case, the electoral climate will be considered when the Trial Examiner hears the case—ordinarily within a few months of the election—whereas the Board first considered it in this case almost 5 years after the election, and 4 years after the complete turnover had occurred. Accordingly, the present case is one of very limited application, involving *Gissel* remands only, and does not require a review of the broad conceptual problem posed by the Petition.

II. Were it assumed, arguendo, that the present case did involve the broad issue, certiorari has been sought for its review in *NLRB v. Clark's Gamble Corp.*, No. 265, 1970 Term, where the "Question Presented" is:

> "Whether enforcement may be refused to an otherwise appropriate bargaining order of the National Labor Relations Board on the ground that the union in whose favor the order ran may have lost its majority status through employee turnover during the period following the commission of the employer's unfair labor practices."

Thus, even if certiorari is deemed appropriate to review such an issue, it need not be granted in this case, particularly where only four employees and one company official were involved, none of whom has been employed by the company for more than four years, on whose behalf the Board has taken this case to the Court of Appeals on three separate occasions.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT E. WACHS,
Attorney for Respondent.

October 19, 1970

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